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No. 99-2071

IN THE

Supreme Court of the United States

TUAN AHN NGUYEN AND JOSEPH BOULAIS,
Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

BRIEF OF EQUALITY NOW AND OTHERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

OGDEN NORTHRUP LEWIS
Counsel of Record
DAVIS POLK & WARDWELL
450 LEXINGTON AVENUE
NEW YORK, NEW YORK 10017
(212) 450-4000

JESSICA NEUWIRTH
EQUALITY NOW
250 WEST 57TH STREET
NEW YORK, NEW YORK 10107
(212) 586-0906

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INTEREST OF THE AMICI[1]

Equality Now is an international human rights organization dedicated to the protection and promotion of women's rights. Human rights principles articulated in international law reinforce the work of the organization. Equality Now has consultative status with the United Nations and regularly submits information to the United Nations Human Rights Committee on implementation of the International Covenant on Civil and Political Rights in countries under review by the Committee with respect to equality and other rights relating to the status of women.

In July 1999, in preparation for the June 2000 Special Session of the United Nations General Assembly to review implementation of the Platform for Action adopted in 1995 at the Fourth World Conference on Women in Beijing, Equality Now issued a report, *Words and Deeds - Holding Governments Accountable in the Beijing +5 Review Process*, highlighting a representative sampling of laws in 45 countries around the world that explicitly discriminate on the basis of sex.

One of the discriminatory laws highlighted in this report was Section 309 of the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 238 (1952), *as amended*, 8 U.S.C. § 1409. Equality Now has continued its efforts to get 8 U.S.C. 1409(a)(3) and (a)(4) amended in accordance with the commitment made by the United States Government, together with other

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[1] The parties have consented to the submission of this brief. The letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part. With the exception of the Urgent Action Fund (P.O. Box 29274, Presidio Building 1016, San Francisco, CA 94129-0274) which supported research for the brief, and no one other than amici's counsel contributed money or services to preparation or submission of this brief.

governments, in ¶232(d) of the Platform for Action, Report of the Fourth World Conference on Women, Beijing, Sept. 4-15 1995, U.N. Doc. A/CONF.177/20, resolution I, Annex II, to revoke laws that discriminate on the basis of sex. Members of Equality Now's Women's Action Network, consisting of more than 5,000 groups and individuals in more than 100 countries around the world including the United States, have written to United States government officials, urging them to work for the adoption of the same legal standard, based on equality, for U.S. citizen fathers and mothers to transmit citizenship to their children born abroad and out-of-wedlock.

Argentine Association of Women Judges (AMJA) was initially founded in 1993 as a chapter of the International Association of Women Judges. In 1997, it became an independent association. The AMJA is based in Buenos Aires and has 280 members around the country including men as well as women and prosecutors and public defenders, as well as judges. Since 1994, the AMJA has run a judicial education program based on international law and entitled "Towards a Jurisprudence of Equality: Women, Judges and Human Rights Laws."

Ethiopian Women Lawyers Association (EWLA) is a non-governmental organization based in Addis Ababa, working for the protection and promotion of women's rights in Ethiopia. The organization is engaged in various legislative initiatives, particularly in relation to family law and laws relating to violence against women. The organization is also engaged in the provision of legal services to women, and in broader educational initiatives for the promotion of legal literacy among women in Ethiopia.

Forum for Women, Law and Development (FWLD) is a non-governmental organization based in Kathmandu, Nepal, working for the advancement of

women's rights in Nepal. FWLD has been involved in a number of test cases on equality issues incorporating the use of international law in domestic courts in Nepal. In June 1999, FWLD submitted a shadow report on the implementation by Nepal of its obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), in connection with a review of Nepal by the United Nations CEDAW Committee. FWLD recently issued a report, "Discriminatory Laws in Nepal and Their Impact on Women: A Review of the Current Situation and Proposals for Change."

International Commission of Jurists (ICJ) is an international non-governmental organization founded in 1952 and based in Geneva. Its global goal is to support and advance those principles of justice which constitute the basis of the rule of law and assist those people to whom the rule of law is denied. The ICJ has consultative status with the United Nations, the Organization of African Unity, and the Council of Europe.

International Federation of Women Jurists (FIFCJ) is a non-governmental organization that was founded in 1926. It is based in Barcelona, Spain and has members from 72 countries. Members include lawyers, judges, and law professors, and the organization engages in activities around the world, particularly in Europe, South America and Africa. FIFCJ has consultative status with the United Nations and has participated in the development of international law including the Convention on the Elimination of All Forms of Discrimination (CEDAW) and other conventions and norms of the European Union.

International Federation of Women Lawyers (FIDA) is a non-governmental organization, founded in 1944 in Mexico City. FIDA, which has consultative status with the United Nations, aims to promote the

principles of the United Nations especially by advancing opportunities for women, particularly in the legal and judicial professions. FIDA is a worldwide organization with members in 80 countries. Members include practicing lawyers, jurists, government ministers, and community leaders.

International Human Rights Law Group is a non-profit organization of human rights and legal professionals based in Washington, D.C. with offices in several countries engaged in human rights advocacy, litigation and training around the world. The International Human Rights Law Group helps empower local advocates to expand the scope of human rights protections for men and women and to promote broad participation in building human rights standards and procedures at the national, regional and international levels.

International Women's Rights Action Watch (IWRAW) was founded in 1985 and is based at the Humphrey Institute, University of Minnesota. IWRAW is a resource and communication center for an international network of 5000 activists, scholars, and government officials focusing on implementation of women's human rights under the UN human rights treaties. It produces shadow reports on the status of women in countries under review by United Nations treaty bodies including CEDAW and provides technical assistance on treaty implementation.

Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM) is a non-governmental organization based in Lima, Peru with affiliates in seventeen countries, working to end violence and promote the human rights of women. In October 2000, CLADEM coordinated the submission of reports to the United Nations Human Rights Committee on the implementation of the International Covenant on Civil and Political Rights by Argentina and Peru, in connection with the Committee's review of those countries.

Women in Law and Development in Africa (WiLDAF) is a pan-African non-governmental organization working to bring together organizations and individuals using law to promote and protect women's rights in African countries. WiLDAF's goal is to promote the effective use of legal strategies by women in Africa for self, community and national development. The organization, which was established in 1990, has chapters in 33 countries of Africa. The Regional Office is based in Harare, Zimbabwe.

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BRIEF OF EQUALITY NOW AND OTHERS AS
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STATEMENT OF FACTS AND PROCEDURAL HISTORY

Equality Now relies on the statement of facts and procedural history set out in Petitioners' Brief.

SUMMARY OF THE ARGUMENT

Equality Now brings to the attention of the Court the importance of considering international human rights law in its review of the constitutionality of 8 U.S.C. § 1409, the law that governs the transmission of citizenship to children born overseas and out-of-wedlock. This law sets forth, in addition to the establish-

ment of paternity, other requirements for U.S. citizen fathers to transmit citizenship to their children born overseas and out-of-wedlock, including a written undertaking to provide financial support, which are not applicable to similarly situated U.S. citizen mothers.

The United States Supreme Court is a model for countries around the world and should play a leading role in the interpretation and application of international law. High courts in other countries have historically looked to the jurisprudence of the Court for guidance, and the United States Government has frequently declared the importance of international law and the promotion of human rights. Particularly in the context of immigration law, the Court has looked to and cited international law.

Under Article VI of the Constitution, all treaties made under the authority of the United States "shall be the supreme Law of the Land." Following its ratification by the United States of the International Covenant on Civil and Political Rights ("ICCPR") in 1992, the ICCPR constitutes a legitimate and important source of legal authority pursuant to Article VI of the Constitution. The ICCPR can and should be drawn upon by the Court in support of constitutional law arguments on issues of fundamental human rights such as the right to equality between men and women, which is at issue in this case. The ICCPR specifically enumerates sex as one of the impermissible grounds of discrimination from which all persons should be protected.

In ratifying the ICCPR, the United States articulated the understanding that sex-based distinctions are permitted if rationally related to a legitimate government objective. In reviewing the legitimacy of governmental objectives served by the sex-based distinctions set forth in 8 U.S.C. § 1409, the Court should consider the growing international as well as national recogni-

tion that such distinctions between fathers and mothers are incompatible with the equal sharing of parental responsibility and serve to entrench stereotypes that absolve men of this responsibility. In this conceptual framework, no legitimate governmental objective is served by formalizing in law traditional stereotypical assumptions about parenting based on the sex of the parent.

Under customary international law, recognition of the right to equality before the law and equal protection of the law provides additional authority for the argument that sex-based distinctions in the right of parents to transmit citizenship to their children, as set forth in 8 U.S.C. § 1409, are unconstitutional. Customary international law has long been recognized as legal authority under U.S. law. Sources of customary international law including treaties, legislative developments around the world and case law in international as well as national jurisdictions all indicate an emerging recognition of the right to equality between men and women in the transmission of citizenship to their children.

International law strongly supports the constitutional law arguments of the petitioners in this case against the constitutionality of 8 U.S.C. § 1409. A finding of the unconstitutionality of 8 U.S.C. § 1409 with reference to international law would be a timely and valuable contribution to the efforts of other high courts around the world to uphold the rule of law and promote the fundamental human rights in which the Constitution and international law are grounded. It would also reinforce the obligation of other nations to change their discriminatory nationality and citizenship laws in favor of granting mothers and fathers the equal right to confer citizenship on their children.

ARGUMENT

I. THE COURT SHOULD CONSIDER THE CONSTITUTIONALITY OF 8 U.S.C. § 1409 WITH REFERENCE TO THE EQUALITY RIGHT SET FORTH IN THE UNITED NATIONS INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

A. Treaties Have the Force of Law under the Constitution and the Court Has Relied on Treaty Law in its Jurisprudence, Particularly in the Context of Immigration.

The United States Constitution, Article VI, clause 2 ("the Supremacy Clause") provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . .

The status of treaties under the U.S. Constitution has long been recognized by the Court. In 1888, Justice Field noted, the Federal Rules and treaties are both "supreme law of the land, and no superior efficacy is given to either over the other." Whitney v. Robertson, 124 U.S. 190, 194 (1888) *See also Foster v. Neilson*, 27 U.S. 253 (1829), *Ware v. Hylton*, 3 U.S. 199 (1796), *Edye v. Robertson*, 112 U.S. 580, 598-99(1884), *Pollard's Heirs v. Kibbe*, 39 U.S. 353, 415 (1840), *Owings v. Norwood's Lessee*, 9 U.S. 344, 348-49 (1809), *Laker Airways, Ltd. v. Pan American World Airways*, 103 F.R.D. 42 (D.D.C. 1984), *Color Sys., Inc. v. Meteor Photo Reprographic Sys., Inc.*, No. Civ. A. 86-2516, 1987 WL 11085 (D.D.C May 8, 1987). More recently, the Ninth Circuit has affirmed that it is the role of the judiciary "to interpret international treaties and to

enforce domestic rights arising from them." *United States v. Decker*, 600 F.2d 733, 737 (9th Cir. 1979).

Particularly in the context of interpreting the Immigration and Nationality Act, the Court has considered and cited international law in its jurisprudence. Immigration law is an area of convergence of U.S. law and international law as often there is a need to ensure coordination among States in such areas as prevention of statelessness, the facilitation of migration and the assurance of border controls. The United Nations Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, 19 U.S.T. 6223 (*entry into force*, Dec. 4, 1967), was ratified by the United States in 1968. Although implementing legislation was passed to incorporate the terms of the treaty in domestic law, the Court has looked to this underlying treaty for guidance in interpreting the law. In *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436-40 (1987), for example, when distinguishing between the "well founded fear" and "clear probability" standards for aliens seeking asylum or withholding from deportation, the Court examined the definition of "refugee" in the Convention on the Status of Refugees as incorporated in the Protocol to determine its meaning under the 1980 Refugee Act, 94 Stat. 102, the implementing legislation. In *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415 (1999), not only did the Court examine provisions of this treaty, the Court even cited the Office of the United Nations High Commissioner for Refugees' Handbook on Procedures and Criteria for Defining Refugees (Geneva 1979) as "a useful interpretive aide." *Id.* at 426.

B. The ICCPR, as a Treaty in Force, Can and Should Be Used in Interpreting the Constitution.

The United States ratified the International Covenant on Civil and Political Rights, *adopted and opened for signature*, Dec. 16, 1966, 999 U.N.T.S. 171 (*entry*

into force 23 Mar. 1976), on June 8, 1992. The U.S. transmittal of its ratification to the United Nations set forth a number of reservations, understandings and declarations designed to ensure consistency between U.S. law and the treaty as ratified.[2] The reservations address freedom of expression, capital punishment, the treatment of juveniles in the criminal justice system, and other areas of law in which the treaty's provisions are limited by the scope of the United States Constitution. The understandings similarly conform provisions of the treaty to U.S. law. The declarations include a declaration that "the provisions of articles 1 through 27 of the ICCPR are not self-executing." 138 Cong. Rec S4781-01, at S4784 (Apr. 2, 1992). The intent of this declaration, as set forth in the report of the Senate Foreign Relations Committee that gave its advice and consent to ratification, was merely to prevent the creation of an independent cause of action under the treaty. *See* S. Exec. Rept. 102-23., 102d Cong. 2d Sess., at 19 (Mar. 24, 1992). As the present case does not rely on the ICCPR as a basis for its cause of action, the impact and legal status of the declaration on non-self-execution is not relevant.[3] The declaration has no

[2] Declarations and Reservations (as of Aug. 2000), U.N. High Commisssioner for Human Rights (visited Nov. 5, 2000) <http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm>.

[3] The legitimacy of this declaration has been questioned by scholars, who have suggested that it is *ultra vires* and *void ab initio*. *See* Jordan J. Paust, *Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DePaul L.Rev. 1257, 1269 (Summer, 1993). Several members of the United Nations Human Rights Committee questioned the U.S. delegation when it presented its initial report on implementation of the ICCPR, as to whether under the Constitution it should fall within the jurisdiction of the Supreme Court to decide whether a treaty is non-self-executing. *See* Summary records of the 1401st and 1402nd meetings: United States of America, 17/04/95, CCPR/C/SR/1401 ¶34 (Ms. Evatt) and CCPR/C/SR/1402 (Mr. Bhagwati).

bearing on the legal force of the substantive provisions of the treaty, or their value as interpretive aides but rather goes solely to the question of remedies and direct creation of a cause of action.[4]

In April 1995, the United States appeared before the United Nations Human Rights Committee, to present its initial State Party Report on implementation of the ICCPR and to answer questions from the Committee, the monitoring body established under Article 28 of the treaty. At that time, a statement was made to the Committee that implementing legislation was not necessary or contemplated as the ICCPR's provisions were already covered by domestic law.[5] *See* Summary record of the 1405th meeting: United States of America. 24/04/95. CCPR/C/SR.1405 (Mr. Shattuck). The United States had declared in its initial report to the Committee, "It is virtually certain that the Supreme Court would strike down any significant distinction between men and women in the enjoyment of the civil and political rights secured by the Covenant, either under the substantive right involved or as a matter of equal protection." *Initial reports of States parties due in 1993: United States of America*, CCPR/C/81/Add.4 (1994) ¶ 105.

Following the presentation of the United States report to the Human Rights Committee, Ms. Evatt, a member of the Committee from Australia, asked

[4] Article 50 of the ICCPR mandates that "[t]he provisions of the . . . Covenant shall extend to all parts of federal States without any limitations or exception." The non-self-executing declaration does not apply to Article 50 of the ICCPR. *See*, Jordan J. Paust, et al., *International Law and Litigation in the U.S.*, 75-76, 398 (West Group 2000).

[5] This statement gives rise to another question as to the meaning of the non-self-executing declaration because the characterization of the treaty provisions as non-self-executing would normally be understood to mean that implementing legislation was required. *See* note 3, *supra*.

"whether the United States Government would encourage courts dealing with rights issues to refer to the Covenant in their decisions." Summary record of the 1401st meeting: United States of America. 17/04/95. CCPR/C/ SR.1401 ¶35. Mr. Lallah, a member of the Committee from Mauritius, expressed the hope "that the judiciary would be made aware of the provisions of the Covenant and the evolving standards resulting from its implementation." Summary record of the 1402nd meeting: United States of America. 17/04/95. CCPR/C/SR.1402. The United States responded that while no separate cause of action was provided for as a result of the non-self-executing declaration, "Many judges were well informed regarding the provisions of the Covenant and many more would become educated through invocation of the Covenant by litigants." Summary record of the 1405th meeting: United States of America. 24/04/95 CCPR/ C/SR ¶5 (Mr. Shattuck).

As a treaty that has recently entered into force in the United States, the ICCPR provides a new source of legal authority for human rights issues that arise under the Constitution. As demonstrated by the dialogue between the U.S. delegation and the Human Rights Committee, there is great interest in the role of the courts and recognition of their importance in giving meaning to the ratification of the treaty.

C. The ICCPR Supports a Finding That Sex Discrimination in the Transmission of Citizenship Violates the Right to Equality Before the Law and Equal Protection of the Law.

In accordance with the principles of equality and non-discrimination set forth in the ICCPR, as well as domestic sources of law, the United States should guarantee its citizens the equal right to confer citizenship on their children born abroad and out-of-wedlock.

Article 26 of the ICCPR provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

This provision applies not only to rights enumerated in the ICCPR but to all areas of public regulation. *See* General Comment 18, (thirty-seventh session, 1989), U.N. Doc. HRI\GEN\1\Rev.1 at ¶26 (1994). The Human Rights Committee, in a General Comment on the meaning of Article 26, observed that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant." *Id.* at ¶13. This interpretation of Article 26 is consistent with the understanding transmitted by the United States when it ratified the ICCPR that distinctions based upon sex are to be permitted "when such distinctions are, at minimum, rationally related to a legitimate governmental objective." 138 Cong. Rec S4781-01, at S4783 (Apr.2, 1992).

Article 3 of the ICCPR provides, "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant." Similarly, Article 2(1) of the ICCPR provides for equal enjoyment of these rights without distinction of any kind, including sex. Although the equal right of men and women to confer citizenship on their children is not explicitly articulated in the ICCPR, the Human Rights Committee has in a General Comment on the interpretation of Article 3 found that, "there shall be no restriction upon or derogation from the equal enjoyment by

women of all fundamental human rights recognized or existing pursuant to law, conventions, regulations of customs, on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent." CCPR General Comment 28, CCPR/C/21/Rev.1/Add.10 (2000) ¶9. Moreover, in another General Comment on the interpretation of Article 24, which gives every child the "right to acquire a nationality," the Human Rights Committee stated that "no discrimination with regard to the acquisition of nationality should be admissible under internal law as between legitimate children and children born out of wedlock or of stateless parents or based on the nationality status of one or both of the parents." CCPR General Comment 17 (Thirty-fifth session, 1989) ¶8. The equality and non-discrimination provisions of the ICCPR apply equally to men and women.

In outlining its compliance with Article 24 of the ICCPR, the United States in its report to the Human Rights Committee referred to the Immigration and Nationality Act provisions on citizenship for children born abroad but failed to note the difference between citizen mothers and fathers conferring nationality on their children born abroad and out-of-wedlock.[6] Although this issue was not raised by the Committee in its review of implementation of the ICCPR by the United States, in considering reports from other countries that have noted the existence of such laws, the Human Rights Committee has often commented that discriminatory nationality and citizenship laws

[6] The United States reported, "The Immigration and Nationality Act further provides that a child born abroad to a U.S. citizen parent (or parents) shall acquire U.S. citizenship at birth provided the U.S. citizen parent (or parents) complied with specified requirements for residency or physical presence in the U.S. prior to the child's birth. 8 U.S.C. section 1401." *Initial reports of States parties due in 1993: United States of America.* CCPR/C/81/Add.4 (1994) ¶ 740.

fall short of compliance with the ICCPR. The Committee noted, for example, with regard to Libyan law, which gives fathers the exclusive right to confer nationality on their children[7], that "inequality between men and women persists in a number of areas, such as. . . acquisition and transmission of nationality." Concluding Observations of the Human Rights Committee: Libyan Arab Jamahiriya, CCPR/C/79/Add.101 (1998) ¶17. The Committee expressed similar concern with regard to a law in Lebanon, which provides that nationality is granted only to the children of Lebanese fathers with few exceptions. *See* Concluding Observations of the Human Rights Committee: Lebanon. CCPR/C/79/Add.78 (1997) ¶18.

In the context of potential statelessness of children[8], the Human Rights Committee has also expressed its concern about laws that treat mothers and fathers differently in the transmission of citizenship to children. In Zimbabwe, according to the government, the law provides that "children who are born outside Zimbabwe acquire citizenship if the father or, in the case of an illegitimate child, the mother is at the time of birth a citizen of Zimbabwe," *Initial reports of States parties due in 1992: Zimbabwe*, CCPR/C/74/Add.3. (1997) ¶234. This law led the Committee to note that "children born to Zimbabweans abroad may not acquire

[7] *See CEDAW in the Arab World*, Al-Raida, Vol.15, No. 80/81 at 27 (Winter-Spring, 1998).

[8] The Court has recognized that avoidance of statelessness is an "issue of the utmost import." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 , 160 (1963). Most countries with discriminatory laws on transmission of citizenship provide for transmission of citizenship through fathers rather than mothers. Although there are usually exceptions for children born out-of-wedlock, it is possible that 8 U.S.C. § 1409, operating in conjunction with laws in other countries that deny women the right to transmit citizenship, could result in the statelessness of a child born out-of-wedlock and abroad.

Zimbabwean citizenship." Concluding Observations of the Human Rights Committee: Zimbabwe, CCPR/C/79/Add.89 (1998) ¶19. With regard to Kuwait, where the law restricts to fathers the right to transmit citizenship, with few exceptions,[9] the Committee noted that "children who are born in Kuwait and whose parents are stateless or only the mother has Kuwaiti nationality do not acquire any nationality." Concluding Observations of the Human Rights Committee: Kuwait, CCPR/CO/69/KWT (2000) ¶17.

The jurisprudence of the Human Rights Committee, both in its General Comments and through its ongoing dialogue with States Parties, clearly establishes that laws that discriminate in the transmission of citizenship to children based on the sex of their parents are incompatible with the ICCPR.

D. No Legitimate Governmental Objective Is Served by the Embodiment in Law of Stereotypical Sex-based Assumptions about Parenting.

In judging the legitimacy of governmental objectives set forth to justify sex-based distinctions in 8 U.S.C. § 1409, the Court should consider that internationally, as well as domestically, there is a growing recognition that distinctions based on differences in the parenting roles of fathers and mothers have no validity. The differentiation of mothers and fathers in transmission of citizenship to their children is not "reasonable and objective," nor is its aim "to achieve a purpose which is legitimate under the Covenant," as required by Article 26 of the ICCPR. Moreover, the ICCPR standard of review is equivalent to a lower standard of review than the standard applicable to this case. *See Brief for Petitioners*, Section II., 24-32.

The Convention on the Elimination of All Forms of Discrimination Against Women, *adopted and opened for signature*, Dec. 18, 1979, *entry into force* Sept. 3,

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[9] *See* Initial report of States parties due in 1997: Kuwait, CCPR/C120/Add.1 (1999) at 300-301.

1981, 1249 U.N.T.S. 20378, ("CEDAW"), a treaty that has been ratified by virtually every country in the world, states in its preamble that "the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole," and that "a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women." Article 5(a) of CEDAW provides that "States Parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women." Article 5(b) provides for "the recognition of the common responsibility of men and women in the upbringing and development of their children..."

More recently, the Platform for Action adopted by the United Nations in 1995 in Beijing notes that "[i]n many countries, the differences between women's and men's achievements and activities are still not recognized as the consequences of socially constructed gender roles rather than immutable biological differences," and that "the upbringing of children requires shared responsibility of parents, women and men and society as a whole." Report of the Fourth World Conference on Women, Beijing, Sept. 4-15, 1995, U.N. Doc. A/CONF.177/20, resolution I, Annex II, ¶ 27-29.

These international principles of equality are mirrored in the jurisprudence of this Court. In *Miller v. Albright*, 523 U.S. 420 (1998), considering the INA provision at issue in this case, Justice Breyer noted that the validity of the statute depended on "the generalization that mothers are significantly more likely than fathers to care for their children, or to

develop caring relationships with their children." *Id.* at 482-83 (1998) (Breyer, J., dissenting). Justice Ginsburg noted that the law in treating mothers and fathers differently was "shaping government policy to fit and reinforce the stereotype or historic pattern." *Id.* at 460 (Ginsburg, J., dissenting). This Court has long recognized that the government should not rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females." *United States v. Virginia*, 518 U.S. 515, 533 (1996) *citing Weinberger v. Weisenfeld*, 420 U.S. 636, 648 (1975), *Califano v. Goldfarb*, 430 U.S. 199, 223-224 (1977).

The presumption that fathers have an inherently less natural relationship with their children than mothers is belied by the facts of this case in which the father served as the primary care-giver. To penalize him as a father through a law that places obligations on him to ensure the transmission of citizenship to his children, which obligations are not placed on a similarly situated mother, is unjust. The law is also out of sync with the nationally and internationally recognized need for the elimination of gender stereotypes and runs contrary to the proactive measures governments have committed to undertake for the promotion of equality between men and women.

II. THE COURT SHOULD CONSIDER THE CONSTITUTIONALITY OF 8 U.S.C. § 1409 WITH REFERENCE TO CUSTOMARY INTERNATIONAL LAW

A. Courts Have Relied on Customary International Law as Part of Domestic Law.

Customary international law, also known as "the law of nations," comprises rules that are "evidence of a general practice accepted as law." *Statute of the*

International Court of Justice Art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 1060 (1945). According to the *Restatement (Third) of the Foreign Relations Law of the United States* § 102(2) (1987), customary international law "results from a general and consistent practice of states which is followed by them from a sense of legal obligation." International conventions, international custom, as evidence of a general practice accepted as law, the general principles of law recognized by civilized nations and judicial decisions are all considered sources of international law. *Id.* at § 102 n.1.

Because general patterns of *opinio juris* and uniformity of behavior establish customary international law, the norms of customary international law are continually evolving. *See Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) *citing Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (that "the courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today"). Customary international law "may be ascertained by consulting the works of jurists, writing professedly on public law, or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *United States v. Smith*, 18 U.S. 153, 160-61 (1820); *See also Filartiga v. Pena-Irala*, 630 F.2d at 876, 881 *citing* the Statute of the International Court of Justice as enumerating treaties, international custom, general principles of law, judicial decisions and teachings as sources international law to be applied.

In recent U.S. jurisprudence, customary international law has played a significant role in cases relating to violations of fundamental human rights. Customary international law has also been used to inform the meaning of or to enhance constitutional powers, rights and duties. *See generally* Jordan J. Paust, et. al, International Law and Litigation in the U.S. (West Group 2000). In a landmark ruling, the Second Circuit

interpreted a 1789 statute, the Alien Tort Claims Act, in the context of evolving customary norms, naming torture as the piracy of the twentieth century. *See Pena-Irala*, 630 F.2d at 880. Numerous subsequent cases have relied on customary international law to help define the contours of accountability under U.S. law for torture and other human rights violations. *See Karadzic*, 70 F.3d at 232, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987), *Martinez-Baca v. Suarez-Mason*, No. 87-2057, slip op. at 4-5 (N.D. Cal. Apr. 22, 1988), *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44 (2d Cir. 1991), *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 502 (9th Cir. 1992), *Abebe-Jiri v. Negewo*, No. 1:90-CV-2010-GET, 1993 WL 814304 (N.D. Ga. Aug. 20, 1993), *aff'd*, 72 F.2d 844 (11th Cir. 1996), *Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994).

Customary international law relating to torture has been interwoven with U.S. legislation through the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) codifying this norm. The interaction between domestic and international law represented by this recent jurisprudence should be replicated in jurisprudence on equality through recognition of equality as a fundamental human right under customary international law.

B. Sex Discrimination in the Transmission of Citizenship Is Contrary to an Emerging Norm of Customary International Law.

Numerous human rights treaties, declarations and resolutions, including the Universal Declaration of Human Rights[10], the ICCPR, the International Cove

[10] *Universal Declaration of Human Rights, adopted and proclaimed by* General Assembly resolution 217 A (III) of Dec. 10, 1948. Article 7 states, "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." The Second Circuit has noted the conclusion of several commentators that the Universal Declaration of Human Rights has become "in toto, a part of binding customary international law." *Pena-Irala*, 630 F.2d at 883.

nant on Economic, Social and Cultural Rights[11] ("ICESCR"), CEDAW[12] and the Convention on the Rights of the Child[13] ("CRC") recognize equality between men and women to be a fundamental human right. Article 9(2) of CEDAW, a treaty specifically focused on women's rights, articulates the equality principle with specific reference to citizenship, providing, "States Parties shall grant women equal rights with men with respect to the nationality of their children." The United States has signed but not yet ratified CEDAW, ICESCR and the CRC. However, these treaties, CEDAW and the CRC in particular, have been ratified by a broad spectrum and overwhelm-

[11] *International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature*, Dec. 16, 1966, 993 U.N.T.S. 14531 (*entry into force* Jan. 3, 1976). Article 2 (2) provides, "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to . . . sex . . . or other status." Article 3 reads, "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."

[12] Article 15 of CEDAW provides, "States Parties shall accord to women equality with men before the law."

[13] *Convention on the Rights of the Child, adopted and opened for signature*, Nov. 20 1989, U.N.G.A. Doc. A/Res/44/25 (*entry into force* Sept. 2, 1990). Article 2(1) provides, "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's . . . sex . . . or other status."

ingly large number of countries. Their equality provisions are an important source of customary international law and should be recognized as such by the Court.

The United Nations has convened four world conferences on women to address issues relating to equality, in Mexico City in 1975, in Copenhagen in 1980, in Nairobi in 1985, and in Beijing in 1995. Recently, the United Nations convened a Special Session of the General Assembly in June 2000 in New York to assess the implementation of the Beijing Platform for Action adopted at the Fourth World Conference on Women in 1995. The declarations issued by all of these conferences prominently highlight the commitment made by governments around the world to equality between men and women. This commitment has been reaffirmed in other United Nations world conferences as well, including the United Nations World Summit for Children in New York in 1990, the United Nations Conference on Environment and Development in Rio de Janeiro in 1992, the World Conference on Human Rights in Vienna in 1993, the United Nations International Conference on Population and Development in Cairo in 1994 and the World Summit for Social Development in Copenhagen in 1995, all of which have upheld the principle of equality between men and women.

The right to equality and the prohibition of discrimination on the basis of sex are also enumerated in Constitutions of countries around the world. A representative sampling of such countries includes Algeria, The Bahamas, Bangladesh, Bolivia, Cameroon, China, Colombia, Ethiopia, India, Japan, Latvia, Lesotho, Madagascar, Mali, Malaysia, Mexico, Monaco, Morocco, Nepal, Nigeria, Pakistan, Peru, Poland, the Sudan, Switzerland, Tanzania, Turkey, Uruguay and Venezuela. *See* Equality Now, *Words and Deeds - Holding Governments Accountable in the Beijing +5 Review Process* (July, 1999).

Although many countries still have laws that discriminate on the basis of sex in the transmission of citizenship, there is a clear and accelerating trend towards the elimination of such laws, in accordance with constitutional and international law norms. While most of these laws deny women rights that men have, the principle of non-discrimination applies equally to men and women.

In Botswana, the case of Unity Dow, now herself a judge on the High Court, successfully challenged the discriminatory law that barred her from transmitting citizenship to her children, born in Botswana. In that case, on the basis of Botswana's constitutional equality provision, the Court of Appeal struck down this provision of the Citizenship Act, which denied Botswana citizenship to any child born within a marriage if, at the time of birth, the father was not a citizen of Botswana. The father in this case was a U.S. citizen. The Court of Appeal cited international law, specifically the African Charter on Human and Peoples' Rights and the Declaration on the Elimination of All Forms of Discrimination Against Women, in finding the discriminatory law unconstitutional. *See Attorney-General of Botswana v. Unity Dow*, CA No. 4/91 at 50, 52-3 (Court of Appeal 1992).

In Canada, the Supreme Court struck down provisions of the Canadian Citizenship Act requiring children of Canadian mothers but not Canadian fathers to submit to a security check in order to be deemed Canadian citizens at birth. The Canadian Supreme Court found this law to be discriminatory in violation of section 15 of the recently adopted Canadian Charter of Rights and Freedoms. In its decision on the citizenship law, which is analogous to the law at issue in this case, the court held, "Only children born abroad of Canadian *mothers* may be legally denied citizenship because of unwillingness to swear an oath. This . . . constitutes a denial of equal benefit of the law. Access

to the valuable privilege of Canadian citizenship is restricted in different degrees depending on the gender of an applicant's Canadian parent." *Benner v. Secretary of State of Canada,* 42 C.R.R.2d 1, ___ (available on WestLaw 1997 CarswellNat 190 at 25). With regard to the justification for the distinction put forward by the government, the Canadian Supreme Court said, "the gender of a citizenship applicant's Canadian parent has nothing to do with the values of personal safety, nation-building or national securities." *Id.* at 24.

Discriminatory citizenship laws have also been challenged successfully through various adjudicative proceedings at the international level. The Human Rights Committee, through its individual complaints procedure established by the Optional Protocol to the ICCPR, found that a discriminatory citizenship law in Mauritius violated the equality provisions set forth in the ICCPR, specifically articles 2(1), 3 and 26 in conjunction with article 23(1). *See Aumeeruddy Cziffra v. Mauritius*, Views of the Human Rights Committee Under Article 5(4) of the Optional Protocol to the ICCPR Concerning Communication No. R.9/35, U.N. GAOR, 36th Sess., Supp. No. 40, U.N. Doc. A/36/40 (1981). The Mauritian Immigration (Amendment) Act and the Deportation (Amendment) Act limited residency rights of alien men married to Mauritian women without similar limitations on alien women married to Mauritian men. Subsequent to this finding, Mauritius changed its law, eliminating the discriminatory provision. *See* Press Release HR/CT/453 (Mar. 19, 1996) (visited Nov. 6, 2000) <http://www.un.org/News/Press> (stating that Section 16 of the Constitution was amended in 1995 to make unconstitutional any law involving discrimination on the grounds of sex, including citizenship laws).

The European Court of Human Rights has also ruled against discriminatory immigration provisions. In a case brought against the United Kingdom, the Court

found the U.K. had violated Article 14, in conjunction with Article 8, of the European Human Rights Convention[14] as a result of the different way in which male and female immigrant residents of the UK were treated in terms of obtaining permission for their wives or husbands to enter or remain in the country. In its decision the court stated, "As to the present matter, it can be said that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention." *Abdulaziz, Cabales et. al,* 94 Eur. Ct. H.R. (Ser. A) at ¶78 (1985). The court rejected the justification given by the U.K. for its discriminatory law, the intent to protect the labor market, as not sufficient to warrant discrimination on the basis of sex. *See id.* The court also rejected the argument that the U.K. was not in violation of Article 14, the equality right set forth in the European Convention on Human Rights, because it was more generous to immigrant men settled in the U.K. than would otherwise be required by the Convention. *See id.* at ¶82.

There is also a clear legislative trend in which many countries around the world have amended their laws to give parents the equal right to transmit citizenship to their children. Such countries include Japan, Switzerland, Italy, Vietnam, Luxembourg, Malta, Thailand, India, South Africa, and Botswana.[15] Some countries

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[14] Convention for the Protection of Human Rights and Fundamental Freedoms, *entry into force*, E.T.S. No. 5, Rome 4.XI. 1950. Article 14 provides, "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[15] "Japan and Switzerland amended their laws on this issue in

have acknowledged their international obligation to change discriminatory citizenship laws by withdrawing reservations to Article 9 of CEDAW following such legislative changes. In 1999 the Republic of Korea withdrew its reservation to this Article[16] following a change in its Nationality Act, which had previously required children born to a Korean mother and foreign father to take the nationality of their father. The 1997 Nationality Act confers equal citizenship rights. *See* Korea Legislation Institute, *Statutes of the Republic of Korea* (Supp.4) at 261.

Liechtenstein is another country that has withdrawn its reservation Article 9(2) of CEDAW as a consequence of legislative changes granting men and women equal rights to confer citizenship on foreign spouses and on their children.[17] Fiji also recently withdrew its reservations to Art. 9(2) of CEDAW following the passage of a Constitutional Amendment Act, which provides that a child born outside Fiji may become a citizen if either parent was a citizen on the date of birth.[18] Cyprus[19],

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1985; Italy in 1987; Vietnam in 1988; Luxembourg and Malta in 1989; Thailand in 1991; India in 1992; South Africa in 1994; and Botswana in 1995." UNICEF, *The Progress of Nations 1998* (visited Nov. 6, 2000) <http://www.unicef.org/pon98/pon98.pdf>.

[16] *See* Declarations and Reservations to CEDAW (as of August 8, 2000), U.N. High Commissioner for Human Rights (visited Nov. 5, 2000) <http://www.unhchr.ch/html/menu3/b/treaty9_asp.htm> at n.40.

[17] Committee Takes up Liechtenstein's Report on Compliance With Convention on Elimination of All Forms of Discrimination Against Women (Jan. 25, 1999) Press Release WOM/1083.

[18] *See* Declarations and Reservations to CEDAW (as of August 8, 2000), (visited Nov. 5, 2000) <www.unhchr.ch/html/menu3/b/treaty5_asp.htm> at n. 45.

[19] *Id.* at n.46.

Malaysia[20] and The Bahamas[21] announced their intention to withdraw their reservations to Article 9(2) of CEDAW upon the anticipated amendment of their citizenship laws to ensure the equal rights of men and women. A similar trend to remove discriminatory laws governing the transmission of citizenship to spouses includes recent changes in Venezuela[22], Zimbabwe[23], St. Vincent and the Grenadines[24], Ethiopia[25], and Mauritius[26].

Sex discrimination in transmitting citizenship cannot be justified because it is deliberately more "lenient" with regard to women. Treaty law, national and international case law and recent legislative developments around the world evidence a customary international law norm prohibiting discrimination on the basis of sex in the transmission of citizenship to children, which the United States Supreme Court should incorporate and support in interpreting the Constitution.

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[20] *Id.* at n.32.

[21] *See* Press Release GA/9723 (June 8, 2000) (visited Nov. 6, 2000) <http://www.un.org/News/Press>.

[22] Article 33 of the 1999 Venezuelan Constitution provides for the acquisition of Venezuelan citizenship by "foreigners who contract marriage with a Venezuelan man or woman . . ." whereas Articles 37 and 38 of the previous Constitution prohibited Venezuelan women from transferring citizenship to their foreign-born spouses. Equality No[illegible] Words and Deeds - Holding Governments *Accountable in the Beijing +5 Re view Process* (July, 1999).

[23] *See* Women's Anti-Discrimination Committee Press Release, WOM/1009, 366th Meeting (Jan. 22, 1998) (visited Nov. 5, 2000) <http://www.unhchr.ch/huricane/huricane.nsf/newsroom>.

[24] *See* Press Release WOM/939 (Jan. 21, 1997) (visited Nov. 6, 2000) <http://www.un.org/News/Press>.

[25] *See* Press Release WOM/889 (Jan. 24, 1996) (visited Nov. 6, 2000) <http://www.un.org/News/Press>.

[26] *See* Press Release HR/CT/453 (Mar. 19, 1996) (visited Nov. 6, 2000) <http://www.un.org/News/Press>.

III. THE UNITED STATES SUPREME COURT IS A MODEL FOR OTHER COUNTRIES AND SHOULD PLAY A LEADING ROLE IN THE ESTABLISHMENT AND PROMOTION OF INTERNATIONAL HUMAN RIGHTS LAW

A. High Courts Around the World Look to the Jurisprudence of the United States Supreme Court for Guidance on Matters of Human Rights.

Historically, the United States has played a leading role in the development of jurisprudence on fundamental issues of human rights, which has served as a model for international law and for constitutional protection of rights in many countries. Courts interpreting their Constitutions, which in many cases have been adopted recently, have relied heavily on U.S. principles of justice and on decisions of the United States Supreme Court.

In South Africa, which adopted a new Constitution in 1993, the Constitutional Court in reviewing the right to freedom from self-incrimination, an issue of first impression, noted the important role of the U.S. Supreme Court as follows:

> When for example, the United States Supreme Court finds that a statutory provision is or is not in accordance with the "due process of law" . . . we have regard to these findings, not in order to draw direct analogies, but to identify the underlying reasoning with a view to establishing the norms that apply in other open and democratic societies based on freedom and equality. *Ferreira v. Levin*, CCT/5/95 (S.Afr.).

This decision cited several United States Supreme Court judgments including *Miranda v. Arizona*, 384 U.S. 436 (1966), *Feldman v. United States*, 322 U.S.

487 (1944), *Hoffman v. United States*, 341 U.S. 479 (1951), *United States v. James*, 60 F. 257 (1894), *Ullman v. United States*, 350 U.S. 422 (1956), *Bolling v. Sharpe*, 347 U.S. 497 (1954) *Board of Regents v. Roth*, 408 U.S. 564, *aff'd*, 408 U.S. 593 (1972) and *Meyer v. Nebraska*, 262 U.S. 390 (1923).

In India, the Supreme Court looked to the jurisprudence of the United States Supreme Court in considering freedom of expression and privacy issues.[27] In its decision, the Indian Supreme Court cited *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), *vacated*, 214 S.E.2d 530 (Ga. 1975), *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Roe v. Wade*, 410 U.S. 113 (1973). The High Court in Australia also looked to the Court's decisions when it implied a constitutional protection for freedom of expression in relation to public affairs. *Australian Capital Television PTY Ltd. v. Australia*, 1992 Aust HighCt Lexis 59. In Namibia, when interpreting the equality provision of its new constitution, the High Court looked to decisions from the United States Supreme Court, as well as decisions from the high courts of Canada, England, India, Malaysia and South Africa.[28] In Argentina, the Supreme Court of Justice of the Nation considered the jurisprudence of the United States Supreme Court in a the context of a discrimination case, citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *aff'd*, 528 F.2d 1102 (8th cir. 1976), *Furnco Constr. Corp. v. Waters*,

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[27] *See* Claire L'Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 Tulsa L.J. 15, 29-30 (Fall, 1998) *citing Rajagopal and Another v. State of Tamil Nadu* (1995) 3 L.R.C. 566 (India).

[28] *Mwellie v. Ministry of Works* (1995) 4 L.R.C. 184 (Namib) cited in L'Heureux-Dube, *supra* note 27 at 21.

438 U.S. 567 (1978) and *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). *See Paola Cassia Ursini v. Gloria Geddes y Otro*, 322 Fallos 2382 (1999).

Certain individual decisions of the United States Supreme Court on fundamental equal protection issues, such as *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955) have had a particularly global impact. This decision has been cited in the courts of Trinidad and Tobago, when considering the expulsion of a student from school for wearing a *hijab* (veil)[29], as well as a court in New Zealand when considering a treaty on Maori fishing rights.[30] American precedents were cited by these courts not only because they are applicable but also "because they stand for a principle and an approach to constitutional interpretation." Claire L'Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 Tulsa L.J. 15, 28 (Fall, 1998).

B. By Referencing International Law in its Judgment, the Court Can Support High Courts in Other Countries in Their Efforts to Promote Human Rights and the Rule of Law.

The pronouncements of this Court are an important source of authority and to the extent that they incorporate or reflect the principles of international law, their application will be of greater value not only for Americans but for all citizens of the world. As Justice Kirby of the Australian High Court noted in a decision of that court:

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[29] *Summayyah Mohammed v. Moraine & Another* (1996) 3 L.R.C. 475, 493 (Trin. & Tobago).

[30] *Te Rananga o Muriwhenua Inc. v. Attorney General* (1990) 2 N.Z.L.R. 641, 656 (C.A.).

> To the full extent that its text permits, Australia's Constitution, as the fundamental law of government in this country, accommodates itself to international law, including insofar as that law expresses basic rights. The reason for this is that the Constitution not only speaks to the people of Australia who made it and accepted it for their governance. It also speaks to the international community as the basic law of the Australian nation which is a member of that community. *Newcrest Mining (WA) Ltd. & Another v. Commonwealth of Australia & Another* (1997) 147 A.L.R. 42, 148 (Austl.).

Justice Claire L'Heureux-Dube of the Supreme Court of Canada has written of the importance of dialogue among high courts, expressing concern that the United States Supreme Court has not played a stronger role in this dialogue by taking note of international and comparative law arguments in its jurisprudence.[31] In this context she specifically cites *Miller v. Albright*, 523 U.S. 420 (1998), in which the Court considered the constitutionality of 8 U.S.C. § 1409, as an example of a case in which the Court might have looked beyond the borders of the United States to such sources and drawn additional strength from them for its opinions.[32] A high level judicial colloquium was convened in 1988 in India on the domestic application of international human rights norms. The "Bangalore Principles" adopted by the meeting, in which judges from around the world (including The United States) participated, affirm that "international human rights instruments provide

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[31] Claire L'Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 Tulsa L.J. 15, 40 (Fall, 1998).

[32] *Id.* at 39.

important guidance in cases concerning fundamental human rights and freedoms."[33]

Promoting the rule of law in other countries has long been an objective of the United States Government. The important role of international law was specifically cited by President Bush in connection with the ratification of the ICCPR. In a letter to Chairman Claiborne Pell of the Senate Foreign Relations Committee, President Bush wrote, "The Covenant codifies the essential freedoms people must enjoy in a democratic society, such as . . . equal protection of the law. . . U.S. ratification would also strengthen our ability to influence the development of appropriate human rights principles in the international community and provide an additional effective tool in our efforts to improve respect for fundamental freedoms in many problem countries around the world." 102d Cong., 2d Sess., 24 March 1992, Exec. Rept. 102-23, Appendix A.

As the ICCPR has now been ratified, reference to it as well as to other sources of international law would complement efforts by the United States Government to promote human rights and the rule of law internationally. The United States Supreme Court has a unique role to play in this regard, having so greatly influenced the jurisprudence of other high courts around the world.

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[33] Reprinted in "*Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights Norms*," Commonwealth Secretariat, Human Rights Unit, pages ix-x.

CONCLUSION

For the foregoing reasons Amici respectfully submit that the Court should reverse the judgment of the United States Court of Appeals for the Fifth Circuit and recognize the equal right of men and women to confer citizenship on their children in reference not only to the United States Constitution but also to the International Covenant on Civil and Political Rights and the customary international law principle of equality before the law and equal protection of the law from discrimination on the basis of sex.

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OGDEN NORTHROP LEWIS
Counsel of Record

DAVIS POLK & WARDWELL
450 LEXINGTON AVENUE
NEW YORK, N.Y. 10017
(212) 450-4000

JESSICA NEUWIRTH
EQUALITY NOW
250 WEST 57TH STREET
NEW YORK, N.Y. 10107
(212) 586-0906

Attorneys for Amici

Equality Now
Argentine Association of Women Judges
Ethiopian Women Lawyers Association
Forum for Women, Law and Development
International Commission of Jurists
International Federation of Women Jurists
International Federation of Women Lawyers
International Human Rights Law Group
International Women's Rights Action Watch
Latin American and Caribbean Committee for the Defense of Women's Rights
Women in Law and Development in Africa